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The Creation of International Law during the Feudalism

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Abstract

The major preoccupations of international law scholars and of national states were the holding and the strengthening of peace, getting the war outside the law, the promotion and the observance of the international law norms, the cooperation between states, the world security. From the father of the international law science, Hugo Grotius we have the ideas regarding rules and principles of international law, the importance of their respect of their, the need of the understanding and cooperation between states, rules regarding the carrying of war, the need for drawing rules, for eliminating the cruelties of wars, the importance of concluding some treaties between countries which must be observed and applied with good faith.

An important role in getting and strengthening peace is given to the multi-lateral cooperation through conventions, understandings, multilateral treaties concluded between states, with the aim of harmonising the international relationships. The areas of interest of peoples have gradually evolved, so that there appeared the need of extrapolating the consolidation of the interstate relationships, going beyond the framework of the bilateral agreement between states. By analysing the evolution of history, one can notice that the states have tried to adopt different ways and manners in order to prevent conflicts and to maintain peace. These ways have translated into practice by the need for the conclusion of agreements or multilateral treaties. Basically, the multilateral cooperation of states in the creation and the application of the norms of international law has resulted in the conclusion of peace, alliance and mutual aid treaties, military, commercial, political, economic, cultural, technical and scientific treaties, and the conclusion of international conventions, regionally and worldwide, through the participation in the international conferences or through international organisations. The purpose of this study is to identify the norms of international law that were created during the feudal age and the contributions of the time scholars to the international law.

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Keywords: international relationships; international law; historical evolution; international society; norms and regulations of international law.

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1. Introduction

The development of the international relationships at the beginning of the human society existence and until today and also the social and political conditions of the universe impose a power interdependence with the formation and evolution of the international public law. The international law must not be conceive independent of political factors because those act or influence the relationships area. The evolution of the international public law it's report at the formation of the human collectivities, at the relationships between these and at their arrangement as states and its totals several stages: the antiquity period, classic period, modern and contemporary period. The authors of international law divide the evolution of the international public law in: pre-state period – when it's appear many practices and customs yet before of the formation of states, determined by the good neighbourhood between the tribal communities; the antiquity, feudalism, modern age and contemporary age.

At the beginning of feudalism the separation of states as a result of the dissolution of the Western Roman Empire and the absence of strong central authorities have caused the stagnation of international law norms, even a strong setback in some areas. During the centuries IV and VIII have sprouted various states on the ruins of the former Empire which have concluded among themselves and with the Byzantine Empire, various peace treaties, alliances or armistice whose compliance was guaranteed by the hostage-taking. After the formation of the Holy Roman Empire of German origin in the year 962, and the affirmation of the Papal power, with centralize tendencies, the entities under their own authority have concluded treaties in different fields (commercial or sailing), they concluded armistices between them or with other states outside the Empire, such as England or Sweden, the Arab States, or countries in Africa and Asia, they even concluded diplomatic relationships with them. The growing feudal dissolution and the multiplication of wars from different little states existing on the European continent determined the Catholic Church to make use of its huge spiritual and moral authority in order to limit the damaging effects of the war. The religious ideas of humanism, based on the love towards people, have contributed to the creation of interpersonal and interstate relationships, the church being able to impose the so-called "peace of God", according to which there were established certain days when war was prohibited under the threat of the religious ex-communication of those who infringed it and there were formulated some fighting rules of carrying the war and of protecting certain categories of persons in time of war. Thus, the Council of Lateran, from 1139, forbade the use of crossbows and the transformation into slaves of the Christian prisoners. As expected, the practice of the conclusion of treaties has grown and they pertained to certain rules of conducting the wars, the transmission of territories through inheritance, marriage or sale. The treaties were guaranteed through oaths, religious pledge, mortgages, castles, fortresses, jewellery or handing over hostages. There have also developed the trade treaties, they virtually became a frequent practice of the free Italian cities that concludes such agreements either between themselves, or they certified them with the Byzantine Empire or with the Hanseatic League, with the Arab sovereign, with the Sultan, or with other cities in the Netherlands, France, Spain. We can bring an example of such an agreement- *the Treaty of 1171* by which Ferrare obliged itself to Venice, Bologna, Mantua, Milan, Madena and Ravena to ensure freedom of transit on the Pad river (Pivniceru, 2007, p.9). These treaties contained clauses withholding economic and trade privileges, clauses which took away the right of distress (i.e. the returning of property lost through shipwreck), the prohibition of piracy and, in some cases, clauses relating to the consular jurisdiction and extraterritorial arrangements for neighbourhoods inhabited by Italians. We could say that from this period it started to strengthen the idea of sovereignty although the war remains the primary means of resolving the conflicts, and also some institutions of the classic international law for using the force (the re-torsion, the retaliation, the peaceful blockade, etc.) and it was tried a circumscription of the reasons legally admitted as for starting the war. At the same time, the legal rules concerning the way of waging the military operations have met a more solid justification.

1.1. Outline of the new rules of international law

The laws as well as the customs of the war enrich now with two fundamental principles that will decisively affect the progress of international law in the area of the rules governing the armed conflicts:

» *the principle of the necessity,* according to which the armed forces of the belligerent parties have to be solely used in order to defeat the resistance of the enemy and to obtain the victory and not to massacre each other's side;

» *the humanitarian principle*, by virtue of which the military means which are used by the parties engaged in the conflict have to be directed only against the fighters, and not against the individuals who do not participate at the hostilities, and the fighters must use only those weapons and fighting methods which serve at the removal from fighting of the enemy and not at creating unnecessary sufferings or of the physical extermination of other fighters.

The conclusion of peace treaties, of alliances, of establishing some transfers of territories or other such politico-military treaties has known in the middle ages a strong development. The intensification of sea trade favoured the appearance of some coding attempts through internal laws of the international customs practiced in this branch of trade. The most important works related to this questions are: *the laws of Oleron* are from the 12th century AD, which regulate the navigation rules in the European ports and *the Consolato del mare* from the 14th century in which it is for the first time expressed the principle of free sail of the ships of the neutral states in time of war, and which codify the customary law rules relating to sea navigation.

At the same time, the idea of just war promoted by the doctrinaires of the Christian religion such as St. Augustine or Thomas d Aquino, which tended to conciliate the religious precepts with the political interest, had a negative role, and it was translated in its practical application of the each side located in the conflict within the meaning of the fact that his war was just and that of the opponent was unjust, what was helping to extend the wars up to the exhaustion of the forces engaged and to the total lack of respect for persons and goods, no matter if they had a connection or not with the war.

The Byzantine Empire created in the Eastern Europe from 395-1453 has brought a significant contribution to the development of international law, materialized through the practice of concluding treaties and the diplomatic one. We know from the history about such documents such as, for example, the treaties concluded by Emperor Bezileu with the King of Persia, with Russian princes or Arab Caliphs. Gradually, the Byzantine diplomacy became a model for other states around the world.

The dissolution of feudalism has generated the process of the state centralization, which resulted in the fifteenth century to the formation of some strong countries, has determined the amplification of the international relationships and the appearance of some principles and new institutions, which spurred the development of the international law. It is the period in which profession and trade developed and the national bourgeoisie was created. The geographical discoveries and the colonial expansion favoured the creation of the systems of addiction considered to be legally admissible.

In politics, the feudal society was dominated by two rivalries, very important in the consolidation of some new ideas of the international law. The first one report on the dispute between the papacy and the royalty of the domination of the Christian European society and the second one referred to the dispute between the kings and seniors regarding the centralizing of the power in the hands of the sovereigns. These incongruences they have also referred in the training ways of the legal norms, being emphasized for a period of time the pre-eminence of the Canon law, if we take into consideration also the fact that a number of institutions from the international law, such as the right of asylum, the armistice or the sanctions were emanating from the church or represented the exclusive privilege of the Pope, who, as we have previously mentioned in the pages of this work, intervened in many occasions as arbitrator between the monarchs (Miga-Besteliu, 2010, p.14). By way of example we can bring to the discussion the Bubble (Auge,1936, pp. 153-154)[1] of Pope Alexander VI from1493 through which South America or the recently discovered New World was separated, between Spain and Portugal and the Pope Hadrian IV's decision to authorize the conquest of Ireland by Henry II (Pivniceru, 2007, p.10; Miga-Besteliu, 2010, p.14.).

[1] A special study of the pontiphycal diplomacy is justified by the considerable quantity of pontiphycal documents preserved in the archives and also by their special quality. These documents can be classified into two categories: documents which have been made valid and documents which weren't made valid by the suspension of a bullet. The bullet, a lead disk carrying a recording, a mark on each of its facets [starting with the XIIth century the portrait of Saint Peter (Pierre) and on the right side the portrait of Saint Paul and on the verso the name of the leading Pope], gave its name to the documents which were abolished. We call a bullet by metonymy in order to reflect a suspended document

1.2. Contributions from scholars to the creation of the international law

Gradually it was attempted the replacement of the influence of the church on law. In doing so, the number of the diplomatic missions and of the rules of the organization of ranks has increased; they also set up some military regulations which established the humanitarian rules of conducting the war; the legal measures against the pirates laid down in the English French criminal legislation through the death penalty. The wars of this age were but, in their great majority, full of cruelties, Hugo Grotius noting in his fundamental work, *De jure belli ac paci*, appeared in 1625, the quasi-total lack of respect for the humanitarian rules during the war which had covered almost the entire Europe, also known as *The thirty years ' war* (1618-1648). Hugo Grotius brought strong arguments in favour of a coherent system of humanitarian rules for protecting the people involved in the hostilities or those who did not participate or do not participate at the fight, how are the hostages and the prisoners, as well as towards the goods. His work exercised a strong influence on the international legal thinking and practice of the age.

For the first time it was shaped the principle of sovereignty, conceived as an expression of the independence of kings and seniors towards the aspirations of domination of the German emperors and the omnipotence of the popes, which is given a more coherent expression by the famous *Westphalic Peace* (1648). The negotiations of this peace treaty have connected European countries regardless of their legal and religious regime. *The peace treaties of Westphalia* stated the right of the German princes of carrying an independent external policy, to declare war and to conclude peace, to make treaties, provided not to carry an external policy hostile to the German Empire. By the treaties concluded in that year at the same time at *Münster and Osnabrück* it is put an end to the political domination of the Holy Roman Empire and the Pope, by asserting the sovereignty and the independence of the national states and the principle of the equilibrium of forces between them. Many authors of international law (Preda-Matasaru, Harihara, Pivniceru, Miga-Besteliu, Mazilu, Moca, Dutu) support the idea that *The peace of Westphalia* represents the starting point of the modern European international law, idea to which we also adhere. Its importance consisted in the formal legalization of the structure of the new Europe, its contribution to the affirmation of the sovereignty and the equality of states as fundamental principles and it has been set up the total religious freedom consecrated through *the principle cujus regio ejus religio (tran. to whom belongs the reign it also belongs the religion*) (Preda-Matasaru, 2007, p.25.), in the sense that the king also gained the right to determine the religion be professed throughout the territory under his rule, in other words the victory of the monarchy over the papality. The treaties mentioned above had a provision related to the infringement of their provisions and it was referring to the fact that the damaged party had to resort to a peaceful way and only if it couldn't succeed, all those states parties to those treaties could resort to a military action against the guilty state within 3 months. Even though these provisions were not applied, they showed an important and constant concern for the organization of the relationships between states. On the other hand, the *Peace of Westphalia* established the supremacy of France with the establishment of French as the official language used in diplomatic relations instead of Latin.

The French hegemony ended through the *Peace of Utrecht* of 1713, which proclaimed *the principle of the balance of powers*, by virtue of which the states could opt for recourse to alliances in order to prevent the expansion of a state or group of states. The reference from this agreement was *to a just balance of power* meant to re-establish the peace and quiet of Christianity.

To the development and affirmation in the age of the institutions of international law have also contributed the scientific papers of some scholars, which firstly belonged to at the Catholic environments, and later to the lay persons. Among the Catholic philosophers who contributed also to the international law we can mention: *St. Augustine and St. Thomas d'Aquinas* who, in addition to the theories about the just and unjust wars they were the promoters of the idea of a theocratic world state headed by *the Pope of Rome, the Bishop Isidore of Seville* (560-636) who has tried to emphasise in his works the scope of the international law, these being the states of war, the building and the fostering of the fortified places, the foreign occupations, the prisoners and the inviolability of the soil, *Toma d' Aquino* (1225-1274) who has exhibited in his works a series of ideas on international law, such as: the notion and the rules of the just war, approving the right to rob the captured territory and to lead in bondage the prisoners, etc.; *Dante Alighieri* (1265-1321), who in his work *About the monarchy* expressed the idea of an absolute, universal monarchy, of the Roman people governed by the German Roman Emperor and being independent to the church; *Pierre Dubois* who, in 1306, proposed the creation of an international organization of the Christian states,

meaning a kind of alliance of the Christian powers, aiming at keeping peace, and the creation of some permanent arbitrary institution in order to resolve the conflicts between the states parties at this alliance; *Nicollo Machiavelli* (1469-1527), developed *the theory of the state reasoning* on behalf of which in the interstate relationships, in order to accomplish the political purposes no means which is used is necessary i.e. it allows the operation of any means which are necessary in order to achieve a goal, including violence, treachery, perjury (Pivniceru, 2007, p.12); *Albericus Gentilis* (1552-1608), Italian jurist, who published a paper on diplomatic law (*About legations*) and numerous works about the war law, in which there are analysed from the legal point of view examples of the practice the international relationships of international existing at that time.

The father of the science of international law is well considered the Dutch jurist *Hugo Grotius* (1583-1645), who through his fundamental works tackled issues of international law from new positions and made important steps to the crystallization of an uniform science in itself for the international law, eliminating the theological and moral elements and at the same time heralding the new rules which have profoundly influenced the international law for centuries (Miga-Besteliu, 2010, p.15). By mentioning in its analysis the division of the international law in *jus naturale* and *jus gentium* (jus naturale et gentium), Hugo Grotius put at the base of the natural law the human reason and not the divine will and considers the ginthic law as a of civil nature, based on the common interests of the states, a law which sprang from their will. Therefore he gave a great legal foundation to the independence and sovereignty of the states, which created the rules of conduct in the relationships between them, therefore giving to the ginthic law a broader scope than to the natural law.

In addition to his contributions to the development of the war law, to the humanization of its war-fighting rules and to the protection of persons in time of war brought through his capital work *De jure belli ac paci*, Hugo Grotius also contributed to the development of other rules of international law. He stated for the first time the principle of the sea liberty in his work *Mare liberum*, and in the diplomatic law Grotius outlined some ideas about the diplomatic immunities, developing also a full theory of the international treaties. An important influence on the development of international law rules, especially with regard to the problems of the war humanized may have had the works of some common authors of the centuries XVII and XVIII like Montesquieu, Rousseau, Hobbes and Leibniz. One could also mention intake brought by the Romanian States through the work of Dimitrie Cantemir, Miron Costin, Nicolae Milescu, Constantin Cantacuzino, and many others.

Obviously the list of those who participated with their works and papers to the creation of the international law and its specific rules is much longer, but the space allocated to this approach does not allow us to proceed further on this matter. But what is important to keep in mind, is that generally, their conception is maintained in the existence of their sovereign power of the state built on the natural law, consisting of the natural principles and on a voluntary law resulting from the will of the nations and made up of the rules applicable to the international law. This voluntary law lays the foundations of the particular mechanism of setting the rules applicable in the international relationships and it needs to be in accordance with the natural law. We can conclude by saying that the will of the states is subordinated to this natural law of the states.

Conclusions

If the antiquity period and the feudalism is characterized through the collaboration pithily bilateral, starting with the modern period it is noticed the trends for extending the international relationships regionally and even worldwide, due to the imposition of the first international organization with universal vocation. However, the isolated or fragmentary theories about the development of the early rules of public international law international have been available to us ever since the ancient times, once with the formation of states. In the drafting of the rules of international law, the establishment of the regulations to reflect their conduct, the more powerful states have always tried to direct this process in their benefit. Up to the early 20th-century the rules of the international law expressed, generally, the interests of the dominant states in the international relationships, expressing the power ratios towards the weaker states and the primacy of the international policy over the international law (Dupuy, Kerbrat, 2012, p.308). Once with the development of the international society and, as a consequence, the increasing interdependencies between states, one can notice the multiplication of the values and common interests among the members of the international community. Their promotion and putting into practice could only be achieved by

means of the specific rules of law which must be accepted, implemented and respected by all the states of the international community, as far as possible.

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